IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1875

GALE GREENBERG, *Respondent*

v.

DONALD LEE MCCABE, D.O., *Petitioner*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Copies of the opinion of the Court of Appeals and the United States District Court are contained in the Appendix of the Petition for Certiorari filed by Edward Joseph, Esquire, counsel for petitioner's insurer, on petitioner's behalf, which is also being filed with this Honorable Court.

JURISDICTION

a) The date of the judgment sought to be reviewed is March 21, 1979, the denial of the petition for rehearing.

b) The Federal District Court had jurisdiction of the case under 28 U.S.C. §1332(1976), diversity of citizenship. This Honorable Court has jurisdiction under 28 U.S.C. §1254(1)(1976).

QUESTIONS PRESENTED FOR REVIEW

I. Whether the petitioner was denied his constitutional right to representation by counsel of his choice under the Fifth Amendment by the trial court's exclusion of his personal counsel from active participation in the trial, leaving only his insurer's attorney to represent him, where there was a conflict of interest between petitioner and his insurer.

II. Whether the petitioner was denied his constitutional right to representation by counsel of his choice under the Fifth Amendment by the trial court's selection of his insurer's counsel to represent him over his own personal counsel.

III. Whether petitioner was denied his right to separate and individual representation by the trial court's exclusion of his personal counsel from active participation in the trial, where that substantial right of individual representation is guaranteed under Pennsylvania Law, in violation of *Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)*, where the Federal District Court was sitting as a State Court in a diversity case.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

a) Amendment 5 of the Constitution, which states:

> "No person shall . . . be deprived of life, liberty, or property without due process of law."

b) 28 U.S.C. §1652(1976).

STATEMENT OF THE CASE

In this diversity action, petitioner, Dr. Donald McCabe was sued for compensatory and punitive damages arising out of his relationship with a patient, the plaintiff, in a medical malpractice action. At trial there was a verdict for respondent for compensatory damages in the amount of $275,000.00, and for punitive damages in the amount of $300,000.00.

The petitioner properly notified his medical malpractice insurer, Aetna Life and Casualty Co., of the suit in a timely fashion. His insurer selected the law firm of Kaliner and Joseph, and Mr. Edward Joseph of that firm, to represent Dr. McCabe pursuant to the contract of insurance, which gives the insurer the right to defend the insured against such claims. Appendix p. 1, Policy of insurance. The Complaint alleged negligence in treatment and willful and wanton conduct and requested both punitive and compensatory damages.

The insurer, by letter of March 31, 1976, advised the petitioner of his right to his "own personal counsel" and advised of the insurer's adverse interest with respect to a possible judgment in excess of the policy limits, and with respect to punitive damages, which are not covered by the policy. Appendix p. 3, letter of March 31, 1976. By an additional letter of March 11, 1977 the insurer advised petitioner that "We reserve our rights to disclaim coverage . . ." and that "at this time that this company will pay no judgment nor indemnify you for any judgment that you may pay arising out of the matters complained of in the Complaint filed in this case." Appendix pp. 5-6, letter of March 11, 1977.

Dr. McCabe selected Jonathan Dunn, Esquire, to represent him as his personal counsel, to the extent of his uninsured interest in the case. Jonathan Dunn was present at the first day of trial, and he was prepared, along with Mr. Joseph, to go on with the trial and represent petitioner at trial. Appendix pp. 7-9, 11-12.

The conflict of interest between the petitioner, insured, and Aetna, his insurer, was stated to the trial judge. Appendix pp. 7-10, N.T. 1-16, 1-22-23. Mr. Dunn stated that he planned on examining witnesses and making objections, and presenting argument in order to represent petitioner properly. Appendix pp. 7-8, N.T. 1-16. Mr. Joseph, the attorney selected by the insurer, stated to the trial judge that any limitation on the participation of Mr. Dunn, personal counsel, would put him, Mr. Joseph, counsel for the insurer, "in a somewhat awkward position". Appendix p. 8, N.T. 1-16. Finally, Mr. Dunn pressed for a ruling, with the following result:

MR. DUNN: "Then you are ruling that I have no right to participate in effect in the case."

THE COURT: "That is right . . ." Appendix p. 8 N.T. 1-17.[1]

The insurance policy had a limit of $250,000.00, so that the recovery was in excess of the policy limits even as to the compensatory damages. Appendix, p. 2. The policy would not cover intentional or willful or outrageous acts, or acts outside the scope of Dr. McCabe's professional conduct. Appendix, p. 1. Under Pennsylvania law the insurer could not pay the punitive damages awarded. Appendix, p. 3. The insurer has in fact disclaimed the obligation to indemnify under the policy, and has filed for a declaratory judgment to that effect.[2]

1. The court further stated that Mr. Dunn would have to provide him with authority before he would change his ruling. However, the court gave Mr. Dunn no time to do so, and the jury was being picked at that very time. There would not be sufficient time to do that and appear for trial. Present counsel has expended considerable time in research on this matter. Further, the court singled out Mr. Dunn rather than Mr. Joseph, and did not consult Dr. McCabe as to whom he wanted to represent him if a choice had to be made. See appendix p. 8, N.T. 1-17.

2. Aetna Life & Casualty Co. v. McCabe v. Greenberg, (E.D. Pa.), No. 78-598, Complaint for Declaratory Judgment filed on 23 Feb., 1978.

Only Mr. Joseph and his associate represented Dr. McCabe throughout the trial. The defense at trial presented no evidence. Mr. Joseph and his associate and his firm were selected by the insurer, Aetna, and represented the insurer, Aetna. Dr. McCabe selected Mr. Dunn to be his personal counsel to represent him to the extent of his uninsured interest. Mr. Dunn in fact appeared at the trial and indicated that he desired to actively participate in the trial, and reserved the right to speak out by way of objections, cross-examination, argument, and presentation of the case for the petitioner, Dr. McCabe. Where there was a disagreement over how the defense should be conducted, Mr. Dunn, in effect, was requesting the right to act independently of the insurer's counsel. Petitioner had great confidence in Mr. Dunn, an old friend. Appendix, p. 8, N.T. 1-17.

In this case there was a conflict of interest between the insurer and Dr. McCabe of the following types:

(1) The claim was in excess of the policy limit;

(2) The claim included theories of law which were both within the coverage of the policy and without the coverage of the policy, so that the insurer had an interest in shaping the trial so as to either preclude all liability, or in seeing that it predicated liability of Dr. McCabe on a theory outside the scope of coverage;

(3) Punitive damages were sought which were outside the scope of insurance coverage, and which could not, as a matter of law, be paid by the insurer.

Mr. Dunn has given his affidavit stating how he would have approached the trial, what he would have done as counsel, and how he would conducted the case.[3] Where excluded counsel would have utilized a

3. Appendix pp. 11-12.

The claim of denial of right to counsel of one's choice is *not* a claim that representation at trial was anything other than adequate, for that is not the issue raised by individual counsel. Where there is a denial of counsel of one's choice, it is of no matter whether counsel

different tack, it gives additional weight to petitioner's claim that he was denied counsel of his choice.

On Appeal to the Third Circuit, Dr. McCabe was represented by Mr. Joseph and his firm. Among the trial errors raised was the denial of Dr. McCabe's right to be represented by his individual counsel.

In this case, Mr. Joseph, counsel for the insurer, represents Dr. McCabe with respect to the non-counsel issues, raised in his separate petition for writ of certiorari, while petitioner has retained Louis Samuel Fine, Esquire, and the firm of Fine, Staud and Grossman to represent him as individual counsel in this petition, on the issues pertaining to the denial of the right to choice of counsel.

NOTE 3 — (*Continued*)

who did represent the individual was adequate or even superior in his representation. Individual counsel at trial, Mr. Dunn, would have followed a different strategy in doing what *he* believed was in petitioner's best interests. Petitioner had confidence in Mr. Dunn and desired his representation.

ARGUMENT

I. The petitioner, Dr. Donald McCabe, was denied his constitutional right under the Fifth Amendment to representation by counsel of his choice in the trial below, where the trial judge excluded petitioner's personal counsel from actively representing him and only allowing the counsel furnished by his insurer to represent him, despite a conflict of interest between the petitioner and his insurer.

There is a constitutional right to representation by counsel in a civil case in the Federal Courts. In *Powell v. Alabama*, 287 U.S. 45, 69 (1932), this Honorable Court stated:

> "If in any case, *civil* or criminal, a state or *federal* court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." (Emphasis added); See also *In re Mandell*, 69 F.2d 830, 831 (2d Cir. 1934).

The right to counsel includes the right to counsel of one's own choice. The defendant "must be afforded a reasonable opportunity to secure counsel of his own choosing." *United States v. Burton*, 584 F.2d 485, 489, 498 (D.C. Cir. 1978), relying on both the Fifth and Sixth Amendments. In *Burton, supra*, the Court of Appeals noted that "the right to choice of counsel is distinct from the right to adequate assistance of counsel."[4]

4. See also *Gandy v. Alabama*, 567 F.2d 1318 (5th Cir. 1978); *United States v. Inman*, 483 F.2d 738, 739-40 (4th Cir. 1973), *cert. denied*, 416 U.S. 988; *United States v. Mardian*, 546 F.2d 973, (D.C. Cir. 1976) (en banc); *Lee v. United States*, 235 F.2d 219 (D.C. Cir. 1956).
In *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 370 F. Supp. 581 (E.D. N.Y. 1973) the court held that courts "must be cautious not to interfere needlessly with the freedom of litigants to proceed

Where there is a conflict of interest the insured has the right to select his own counsel. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 536 F.2d 730, 737 (7th Cir. 1976); *DiPrampero v. Fidelity and Casualty Co. of N.Y.*, 286 F.2d 367 (3rd Cir. 1961). In *DiPrampero v. Fidelity and Casualty Co. of N.Y., Supra*, the court stated:

> "It may well be preferable that all possibility of conflict of interest be avoided through the defense of insured and uninsured interests by separate and independent counsel whenever there is doubt whether the policy covers the circumstances of the accident."

In *Outboard Marine Corp. v. Liberty Mutual Insurance Co., supra*, 536 F.2d at 737 the court stated:

> "If a conflict of interest does exist, OMC has the right to its own counsel . . . and even in the absence of a direct conflict of interest, OMC cannot be compelled to surrender control of the defense if Liberty Mutual lacks an economic motive for a vigorous defense."

The right to counsel of one's choice extends to additional counsel and associate counsel. *United States v. Burton, supra*, 584 F.2d at 498, n. 46, (Majority opinion), 508, text, and n. 45, 46. (Dissent).

Mere presence at trial or by sufferance of the insurer's counsel is not active participation. *United States v. Mandell*, 525 F.2d 671 (7th Cir. 1975), (Merely sitting at counsel table during trial without active participation in the record, although appearance entered, is not representation); *Ballard v. Citizens*

NOTE 4 — *(Continued)*
with counsel of their choice." See also, *United States v. Morrison*, No. 78-2258 (3d Cir. May 10, 1979), reported at 180 The Legal Intelligencer No. 99, p. 1, 11, issue of May 24, 1979. Published at 66 N. Juniper St., Philadelphia, Pa.

Cas. Co. of N.Y., 196 F.2d 96 (7th Cir. 1952) (Incidental participation by insured's attorney "by sufferance" of insurer's counsel did not estop insured from seeking excess coverage); *Anderson v. Southern Surety Co.*, 107 Kan. 375, 191 P. 583 (1920).

There is a conflict of interest between the insured and insurer when there is a disclaimer or reservation of the right to disclaim by the insurer where the claim may exceed the limits of the insurance policy, where the insurer claims that the acts committed are outside the coverage of the policy and where punitive damages are being sought.[5] See discussion in *Perkoski v. Wilson*, 371 Pa. 553, 92 A.2d 189 (1952); *Tomerlin v. Canadian Indemnity Co.*, 61 Cal.2d 638, 39 Cal. Rptr. 731, 394 P.2d 571 (1964); *Nichols v. American Casualty Co.*, 432 Pa. 480, 225 A.2d 80 (1966); *Farm Bureau Mut. Automobile Insurance Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949); *Insurance Company's Dilemma: Defending Actions Against the Assured*, 2 Stan. L. Rev. 383, 392 (1949-50); Brodsky, *Duty of Attorney Appointed by Liability Insurance Company*, 14 Clev.-Mar. L. Rev. 375 (1965); *The Insurers' Duty to Defend Under a Liability Insurance Policy*, 114 U. Pa. L. Rev. 734, 738-42, 745-46 (1966); Haskell and Page, *The Insurer's 'Conflict of Interest' Dilemma*, 65

5. The leading case in Pennsylvania on punitive damages is *Esmond v. Liscio*, 209 Pa. Super. 200, 224 A.2d 793 (1966), which states, as follows:

> "Pennsylvania adheres to the orthodox view that punitive damages are in no sense intended as compensation to the injured plaintiff. They are, rather, a penalty, imposed to punish the defendant and to deter him and others from similar 'outrageous' conduct . . ." 109 Pa. Super. at 212; see also *Phillip v. United States Lines Co.*, 240 F. Supp. 992 (E.D. Pa. 1965).

Esmond v. Liscio, supra, specifically held that the insurer could not pay punitive damages awarded against an insured. Thus, punitive damages are quasi-criminal in nature requiring the counsel standards of criminal procedure as a constitutional protection, an additional reason for granting review.

Ill. B.J. 220 (1976); Aronson, *Conflict of Interest*, 52 Wash. L. Rev. 807, 822-25 (1977).

In *Tomerlin v. Canadian Indemnity Co.*, 61 Cal.2d 638, 39 Cal. Rptr. 731, 394 P.2d 571 (1964) the California Supreme Court stated the underlying reasons in a case involving an insurer:

> [I]nsurer may be subject to substantial temptation to shape its defense so as to place the risk of loss entirely upon the insured. [If the insurer disclaimed liability under the policy] its sole economic motive for prosecuting a vigorous defense had been eliminated. . . . Customarily, insurers, in cases involving tort claims in excess of policy limits, notify the insured that he may employ his own attorney to participate in the defense. A like duty must arise in the instant case in which potential conflict stemmed not only from multiple theories of the . . . complaint and the propriety of settlement, but from the total absence in defense of any economic interest in the outcome of the suit. . . .
>
> In actions in which the insurer lacks an economic motive for a vigorous defense of the insured, or in which the insurer and insured have conflicting interests, the insurer may not compel the insured to surrender control of the litigation. 394 P.2d at 577; 61 Cal.2d at 647, 648.

The right to choice of counsel is not subject to the harmless error rule. The relationship of client and attorney is a highly personal one which requires "faith and confidence." *In re Mandell*, 69 F.2d 830, 831 (2d Cir. 1934). Where the right to choice of counsel has been denied reversal is required. *United States v. Burton, supra*, 584 F.2d at 491, N.19, 516; *United States v. Sheiner*, 410 F.2d 337, 342 (2d Cir. 1969) *Cert. denied*, 396 U.S. 825, *Magee v. Superior Court*, 8 Cal.3d 949, 506 P.2d 1023, 1025 (1973), 106 Cal. Rptr. 647; *In re Mandell, supra:* See *Chapman v. California*, 386 U.S. 18 (1967).[6]

Clearly, in civil actions there is a constitutional right to counsel of one's choice under the due process clause of the Fifth Amendment. That right extends to the right to have chosen counsel actively participate in the proceedings. There is a denial of that right to counsel where the trial court prevents one's chosen counsel from actively participating in the trial. Representation by an attorney selected only by one's insurer without consent where there is a conflict of interest, and that conflict of interest is clearly stated to the trial judge, is not representation by counsel of one's choice.

The decision of the Court of Appeals is in conflict with its own prior decision in *DiPrampero v. Fidelity and Casualty Co., supra* and with the rationale of the decision of the Courts of Appeals in the District of Columbia, and the Fourth and Seventh Circuits in *United States v. Burton, supra; Claverie v. American Casualty Co.*, 76 F.2d 570 (4th Cir. 1935); *Ballard v. Citizens Casualty Co., supra*, and *Outboard Marine Corp. v. Liberty Mutual Ins. Co., supra.* The decision also is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Liability insurance contracts are imbedded in the nation's social and economic fabric. Industry insures itself against liability for defective products, and for the torts of its employees; individuals purchase automobile liability insurance policies, sometimes under

6. Even if a showing of prejudice is required, the affidavit of Jonathan Dunn, Esquire, personal counsel of petitioner at the trial shows that at trial he was prepared to impeach the credibility of Mrs. Greenberg, and to present witnesses whose testimony "would have cast the relationship of Dr. McCabe and Gale Greenberg in a different light more favorable to Dr. McCabe." Appendix p. 11. Mr. Joseph, counsel for the insurer, presented no witnesses.

compulsion of state laws, and a variety of other policies which also cover personal liability in number of situations. Federal courts will be frequently presented with this issue.

Also, where a party may suffer a loss of property in an amount staggering to an individual, due process of law requires that he have his day in court. His day in court is not the same as the insurance company's day in court.[7] He may not have his individual counsel precluded from participation in the trial and be forced, without consent, to representation solely by an insurer with an adverse interest. The power of an advocate to shape the appearance of a trial record through his examination of witnesses, and choice of what evidence or witnesses he should present to the jury is great. Further, it is often the subtle items which are of the greatest importance, for, like an artist, an attorney may emphasize a fact here, or place an apparently damning fact in a harmless context there, highlight one witness and obscure another, where such an impression is made that the final result may be different. The relationship of client and attorney is a highly personal one which requires "faith and confidence." *In re Mandell, supra.* It is that personal relationship which was totally obstructed by the trial court's decision.

A review of this question would be in the interest of the insurer as well as that of the insured, since it would clarify the obligations and duties of the insurer in similar situations.[8] Further, review would provide a

7. The trial judge's suggestion that the defendant could settle the coverage question in other proceedings is not relevant, here. App. *10* N.T. 1-23. The insurer's attorney was not responsible for the trial judge's decision. Indeed, he felt it put him in an "awkward position." Thus, absent review for trial error in *this* case, the petitioner may be precluded from review of that error forever.

8. Based on the trial record the insurer has already filed for declaratory judgment seeking to be relieved of all obligations under the insurance policy. Since neither insurer nor insured were responsible for the trial judge's ruling, there is a serious question as to how this ruling could be treated in the independent declaratory judgment action. Many cases indicate that the presence or absence of individual counsel, or the consent or lack thereof by the insured to sole representation by insurer's counsel may reflect on the insurer's liability under the policy. Compare *Bell v. Commercial Insurance Co. of Newark, N.J.* 280 F.2d 514, 516 (3rd Cir. 1960) with *LaRocca v. State Farm Mutual Automobile Insurance Co.*, 329 F. Supp. 163 (W.D. Pa. 1971), aff'd, 474 F.2d 1338 (3rd Cir. 1973).

guideline for federal and state trial courts, since the situation in the instant case is a recurring and significant problem. This is an ideal case for this court to rule on the issue of the right of an insured to have counsel of his choice actively participate in the trial, where there is a conflict of interest between the insured and his insurer.

The issue of the right to counsel, in this case, is a question of pure law. No factual resolution is required. All of the facts pertaining to the exclusion of personal counsel are undisputed and set forth on the record, and the record does not require any factual clarification. Accordingly, this issue is ripe for judicial review.

II. The petitioner was denied his right to counsel of his choice under the Fifth Amendment by the trial court, where the court selected counsel for his insurer to represent him over his personal counsel.

Dr. McCabe was entitled to counsel of *his* choice. *United States v. Burton*, 584 F.2d 485, 489, 498 (D.C. Cir. 1978); *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 370 F.Supp. 581 (E.D. N.Y. 1973); *Di-Prampero v. Fidelity and Casualty Co. of N.Y.*, 286 F.2d 367 (3rd Cir. 1961); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 536 F.2d 730, 737 (7th Cir. 1976).

In the present case both Edward Joseph, the counsel selected by the defendant's insurer, and Jonathan Dunn, defendant's individual counsel, had entered their appearances. On the first day of the trial, immediately prior to the selection of the jury, the issue of

active representation by both counsel arose. The trial judge was informed of the conflict of interest between the insurer and insured. Nevertheless, he stated that only one counsel would be allowed to actively participate, and he placed on Mr. Dunn the burden of establishing *his* right to participate in the trial. No burden was placed on Mr. Joseph. The defendant, Dr. McCabe was not asked whom he wanted to represent him at trial.[9] Instead, the trial judge made a ruling that Mr. Dunn could not actively represent Dr. McCabe. Appendix p. 8, 9, 10, N.T. 1-17, 1-22-1-23.

The trial judge had no right to select the counsel whom he would allow to represent Dr. McCabe. See *Magee v. Superior Court*, 506 P. 2d 1023, 1025, 8 Cal.3d 949, 106 Cal. Rptr. 647 (1973); *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *cf. Faretta v. California*, 422 U.S. 806, 821 (1975); *SEC v. Csapo*, 533 F.2d 7, 10-11 (D.C. Cir. 1976).

III. The petitioner was denied his right to individual representation, a substantial right afforded under Pennsylvania law, in violation of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), in a diversity of citizenship case, where the law of Pennsylvania governs.

Under the law of Pennsylvania, in a civil suit, a party has the right to be present at trial either by himself or by his attorney. 17 Pa. Stat. §1601; *Krull v. Krull*, 236 Pa. Super. 207, 344 A.2d 619 (1975). That right extends to counsel of his choice. *Kremer v.*

9. The insured is not required to accept counsel provided by the insurer, *Reynolds v. Maramorosch*, 208 Misc. 626, 144 N.Y.S. 2d 900 (1955).

If Petitioner had in fact rejected the insurer's counsel, that rejection could have been a breach of the insurance contract, since the insurer had the right, under the policy, "to defend any suit against the insured." App. p. 1. See *Reynolds v. Maramorosch*, supra. Such an action could have forfeited all of Petitioner's rights to claim he was in fact covered by the policy.

Shoyer, 453 Pa. 22, 311 A.2d 600 (1973); *Moore v. Jamieson*, 451 Pa. 299, 307-308, 306 A.2d 283 (1973).

It is recognized that an individual may require separate representation in two capacities in a lawsuit. See *Allen v. Duignan*, 191 Pa. Super. 608, 159 A.2d 21 (1960); *Ottaviano v. SEPTA*, 239 Pa. Super. 363, 361 A.2d 810 (1976).

Pennsylvania has specifically recognized that a conflict of interest may arise between an insurer and an insured where the scope of coverage is not identical to the claim, or there is a potential claim that the claim is totally without the scope of the policy. *Perkoski v. Wilson*, 371 Pa. 553, 92 A.2d 189 (1952); *Cowden v. Aetna Casualty and Surety Co.*, 389 Pa. 459, 134 A.2d 223 (1957). Where such a conflict has arisen the insurer is required to notify the insured of this adverse interest and of the insured's right to secure individual counsel of his choice. *Perkoski v. Wilson*, *supra*.

In *Nichols v. American Casualty Co.*, 423 Pa. 480, 225 A.2d 80 (1966) the Pennsylvania Supreme Court stated the rule, thusly:

> [I]f an insurance carrier is contemplating refusing to indemnify it should advise the insured to secure competent counsel of his choice. In the instant case, the carrier, by following this practice, avoided the risk that the insured might suffer injury by reason of being denied insurance coverage after trial or settlement, *at which he was not represented by his own counsel.* (Emphasis added). 423 Pa. at 484.

In *Bernat v. Socke*, 180 Pa. Super. 512, 118 A.2d 253 (1955) the court denied excess liability, since in that case the insured "did in fact employ private counsel to assist him, thus tending to negate the inference of prejudice which might arise when the defense is conducted solely by an insurer's lawyer whose interest might be antagonistic to those of defendant." 180 Pa. Super. at 518.

In *DePrampero v. Fidelity and Casualty Co. of N.Y.*, 286 F.2d 367 (3rd Cir. 1961) the Court of Appeals stated that it would be "preferable" for the defense of insured and uninsured interests to be conducted by "separate and independent counsel." *DiPrampero, supra*, had been favorably cited in *Nichols v. American Casualty Co., supra.* See also *Bell v. Commercial Insurance Co. of Newark, N.J.*, 280 F.2d 514, 516 (3rd Cir. 1960); *LaRocca v. State Farm Mutual Automobile Insurance Co.*, 329 F. Supp. 163 (W.D. Pa. 1971), *aff'd*, 474 F.2d 1338 (3rd Cir. 1973); *SEPTA v. Transit Casualty Co.*, 55 F.R.D. 553,556 (E.D. Pa. 1972); *Swedloff v. Philadelphia Transportation Co.*, 409 Pa. 382, 187 A.2d 152 (1963); *Cowden v. Aetna Casualty and Surety Co., supra.*

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) this Honorable Court held that in diversity of citizenship cases, the federal district court is required to apply the law of the state, which in this case is Pennsylvania. Indeed, this Honorable Court therein stated:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. . . . 304 U.S. at 78.

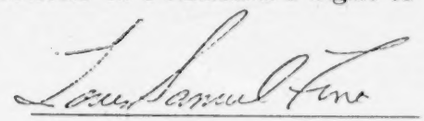
The right to counsel is a substantive right, and a right which may make a difference in the trial on the matter. Indeed, the Pennsylvania courts, and the federal courts in deciding similar questions in diversity cases, have consistently adhered to the position that independent counsel may make a difference in the trial, and have granted relief where there was no independent counsel where the insured did not specifically consent to the insurer's counsel representing him in his uninsured as well as insured interest. See *Bell v. Commercial Insurance Co. of Newark, N.J., supra,* and compare with *Nichols v. American Casualty Co.,*

supra, and *DiPrampero v. Fidelity and Casualty Co. of N.Y., supra.*

Accordingly, Dr. McCabe, Petitioner, was denied his right under Pennsylvania law to have his uninsured interest represented by his independent counsel.[10]

CONCLUSION

WHEREFORE, the undersigned independent, individual counsel for petitioner, Dr. McCabe, respectfully pray that this Honorable Court grant the Petition for Certiorari on the questions of Petitioner's right to choice of counsel.



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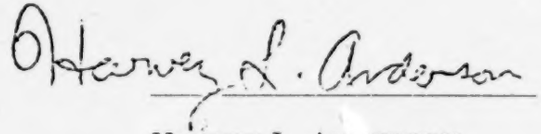
10. This is a right recognized by the laws of several of the states: *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 355 N.E. 2d 24 (1976); *Prashker v. United States Guarantee Co.*, 1 N.Y. 2d 584, 136 N.E. 2d 871, 154 N.Y.S. 2d 910 (1956); *Fidelity & Casualty Co. of N.Y. v. Stewart Dry Goods Co.*, 208 Ky. 429, 271 S.W. 444 (1925); *Magoun v. Liberty Mutual Insurance Co.*, 346 Mass. 677, 195 N.E. 2d 514 (1964); *Tomerlin v. Canadian Indemnity Co.*, 61 Cal. 2d 638, 394 P.2d 571, 39 Cal. Rptr. 731 (1964).

* Member of the Bar of the Supreme Court (formerly of 5506 Wentworth Avenue, S. Minneapolis, Minnesota)

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 1979, three true and correct copies of the Petition for Writ of Certiorari were personally served on James E. Beasley, Esquire, Beasley, Hewson, Casey and Stopford, 21 South 12th Street, Philadelphia, Pennsylvania 19107.

I further certify that all parties required to be served have been served.



HARVEY L. ANDERSON
Attorney for Petitioner

APPENDIX

PART I—PROFESSIONAL LIABILITY INSURANCE

I. COVERAGE AGREEMENTS

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

Individual Professional Liability Coverage

Injury arising out of the rendering of or failure to render, during the policy period, professional services by the individual insured, or by any person for whose acts or omissions such insured is legally responsible, except as a member of a partnership, performed in the practice of the individual insured's profession described in the declarations including service by the individual insured as a member of a formal accreditation or similar professional board or committee of a hospital or professional society, and the company shall have the right and duty to defend any suit against the insured seeking such damages, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and, with the written consent of the insured, such settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Exclusion

This insurance does not apply to liability of the insured as a proprietor, superintendent or executve officer of any hospital, sanitarium, clinic with bed and board facilities, laboratory or business enterprise.

II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

(a) under Individual Professional Liability, each individual named in the declarations as insured;

III. LIMITS OF LIABILITY

Individual Professional Liability Coverage

The limit of liability stated in the declarations as applicable to "each claim" is the limit of the company's liability for all damages because of each claim or suit covered hereby. The limit of liability stated in the declarations as "aggregate" is, subject to the above provision respecting "each claim", the total limit of the company's liability under this coverage for all damages. Such limits of liability shall apply separately to each insured.

IV. ADDITIONAL DEFINITION

When used in reference to this insurance "damages" means all damages, including damages for death, which are payable because of injury to which this insurance applies.

THE AETNA CASUALTY AND SURETY COMPANY
PROFESSIONAL — LIABILITY POLICY
Physicians, Surgeons, Dentists and Optometrists

NAMED INSURED AND OFFICE ADDRESS ▸ For
Donald Lee McCabe, D.C.
1080 Lakeview Road
Harrisburg, Penna. 17112

COVERAGES	LIMITS OF LIABILITY	
	Each Claim	Aggregate
Professional Liability	$250,000	$500,000
Individual Coverage provided for	Donald Lee McCabe, D.C.	

Casualty & Surety Division
1617 John F. Kennedy Boulvard
Philadelphia, Pa. 19103
854-7200
March 31, 1976

Dr. Donald Les McCabe
Delaware Valley Mental Hospital
Doylestown, Pa.

GREENBERG vs. McCABE, DATE OF LOSS — 2/11/74

Dear Dr. McCabe:

We have received Complaint filed against you in the above case. This matter has been referred to our attorney(s) Kaliner & Joseph, Suite 1600 — Two Penn Center Plaza, Phila., Pa. 19102. Our attorneys will take all steps required on your behalf in accordance with the terms and conditions of the policy of insurance applicable to this case.

The amount sued for is "In excess of Ten Thousand Dollars" for injuries allegedly sustained by the above claimant. We must call to your attention the fact that it is possible for a judgement to be obtained in excess of your policy limits. We must also call to your attention the fact that there is demand made for punitive damages. According to present Pennsylvania law it is against public policy for an Insurance Carrier to pay that portion of a judgement allocable to punitive damages against a Tort Feasor.

For these reasons you are at liberty, if you so desire, to associate your own personal counsel, at your own expense, in the defense of this suit.

Thank you for your cooperation and referring this matter to us promptly.

Sincerely,

C. F. Higgins, Jr., Suit Supervisor
Philadelphia Claim Department
CFH/ow

CC:
file
(IIO)
Agent—William D. Kellar, Jr., Hoffman & 6th Sts., Harrisburg, Pa. 19105.
Attorney—Jonathan D. Dunn, 438 Main St., Pennsburg, Pa. 18073
Kalinar & Joseph

Casualty & Surety Division
1617 John F. Kennedy Boulevard
Philadelphia, Pa. 19103
854-7433 C/R Ralph P. Volpe
March 11, 1977

Dr. Donald Lee McCabe
5903 Watt Avenue
North Highland
Sacramento, Calif. 95660

Re: Greenberg vs McCabe

Dear Dr. McCabe:

This is to advise you that we reserve our rights to disclaim coverage for you in the above case. Under the terms of our policy, coverage is afforded for:

> "all sums which the insured shall become legally obligated to pay as damages because of: injury arising out of the rendering of or failure to render, during the policy period, professional services by the individual insured . . ."

Review of your deposition in this case indicates that you have testified very specifically that your sexual activity with Mrs. Greenberg was not part of your therapy. The injuries claimed in the Complaint, some or all of which are claimed to be permanent, are as follows:

Left frontal skull fracture;
Cerebral concussion;
Headaches;
Blurred vision;
Intravaginal trauma;
Parametritis;
Multiple contusions;
Abrasions and bites;
Scarring;
Shock;
Mental anxiety;

Embarrassment;
Injury to her nerves and nervous system;
Pain and mental suffering;
Lost earnings and earning capacity; and
Special damages.

All such injuries are related to an incident which occurred in the early morning hours of February 11. Whatever happened between 2:30 a.m. on that date and the injuries that Mrs. Greenberg suffered were not the result of professional treatment, and therefore, not insured under your medical malpractice insurance policy with this company. You are therefore advised at this time that this company will pay no judgment nor indemnify you for any judgment that you may pay arising out of the matters complained of in the Complaint filed in this case.

We will continue to afford you a defense throughout this case, but this can not be construed in any way to be a waiver of our position that you are not entitled to coverage on the facts involved in this case.

Very truly yours,

R. P. Volpe, Suit Representative
Phila. Claim Dept. Suit Unit

IN CHAMBERS

MR. DUNN: May I ask you a question, Your Honor. As private counsel here, it is difficult to know when to step in or to do it at all. As private counsel for Mr., Dr. McCabe, of course, I have my own opinions, all of which 100-percent totally disagree with Mr. Beasley's. I don't even recognize the man he is talking about. Putting that to the side —

THE COURT: Maybe you have the wrong client.

MR. DUNN: I must following his, what he just said about him.

It is our position, as Mr. Beasley put it on this record, that the only thing that happened here was that his divorce and — her ring and his divorce didn't coincide and brought about this lover's quarrel.

Of course, I have been involved with this case longer than anybody has and both of them, so, I don't concern myself too much about the publicity, unless Mr. Joseph feels for some reason —

THE COURT: Well, that has been ruled on.

MR. DUNN: That doesn't disturb me too much.

THE COURT: I am glad to hear it for the record, but —

MR. DUNN: Because I don't think it is important.

THE COURT: I also feel it is irrelevant.

MR. DUNN: I also feel this case, since Mr. Beasley speaks of morality, I am thinking more in terms of motive. Morality may lead into motive, but there is a lot of reasons people do things, and this is not a particularly earth-shattering type of a case in my opinion. It happens every day, and sometimes they do and sometimes they don't, but this is our position as private counsel, and where I get into the act I don't really know here because Mr. Joseph really has carried the ball all the way through and whether or not the Court will permit me to cross-examine is also —

THE COURT: No. I will only permit one attorney to cross-examine for one client.

MR. DUNN: Very well.

MR. JOSEPH: That puts us in a somewhat awkward position because of the, you know, the coverage problem which was raised earlier, sir.

MR. DUNN: The situation is that if in fact — my recollection of the letter was they denied coverage. Now, they got a copy of that letter too. They simply denied coverage on the basis that Mrs. Greenberg had done such a good job showing that she was criminally assaulted, there was no longer any medical matter involved.

But that leaves us at the point where the address to the jury at the end, I do get a crack at it, or don't I?

THE COURT: Well, I will have to think about that.

MR. DUNN: You would have in effect two attorneys addressing the jury on behalf of one defendant.

THE COURT: My inclination is that only one attorney gets a crack at the jury for one defendant.

MR. DUNN: Will I have the right to pose objections, Your Honor, throughout the trial?

We have the situation here where, aside from being a district attorney, I have known this man for four years. There is no way in the world that I could convey to Mr. Joseph all of that which I know about this matter.

THE COURT: Well, you were aware that this problem was going to arise. Do you have any authority on this? Have you looked up any law? Have you attempted to find any law?

MR. DUNN: I have none with me.

THE COURT: Then I will rule against you until you find something.

MR. DUNN: Then you are ruling that I have no right to participate in effect in the case.

THE COURT: That is right. If you don't think enough of your position to look up some law to give it to me, then I don't think enough of it to sustain your position.

It is a most unusual kind of a situation. I would certainly have thought that you would have given me some law on that, but since you haven't I will simply rule against you until you find some law to the contrary.

MR. DUNN: Very well, sir.

AFTERNOON SESSION

(Reconvened in open court at 2:15 p.m.)

THE COURT: Are the jurors all here? Will you try to take your seats as it were.

(The following took place at side-bar:)

MR. DUNN: O.K. Now, with reference to the conference in the judge's chambers, I held myself as representing the individual defendant; in effect meaning the defendant excess in case — whatever the limits.

Now, I thought perhaps I might have misled the Court. Our position is here that he didn't do anything. Nothing wrong with what he did, but if he did do so it was negligible and not intentional, and that there should be coverage in effect.

THE COURT: That is not before me.

MR. DUNN: Well, I want it on the record anyway.

THE COURT: Well, that is all right.

MR. DUNN: Because it seems, at least as to Mr. Beasley, I was in a peculiar position of being neither fish nor fowl in this particular show, and in effect I am here only as excess carrier.

I might also put on the record: I am not supposed to be here. I just got out of the hospital and there may be a possibility I may have to just leave.

THE COURT: Yes, yes. I am not going to sit this afternoon. I am not going to stay in the Courthouse because this heat is terrible.

MR. DUNN: If I feel O.K. I will come in.

THE COURT: However, the question of coverage is for an entirely different proceeding. I mean, that is for when there is garnishment, if there is a verdict, and if there is no verdict for the plaintiff, the question of coverage is moot.

MR. DUNN: I want it on the record for the purpose of the coverage in the event a verdict comes in.

THE COURT: All right, sure. I understand.

(End of proceedings at side-bar.)

COMMONWEALTH OF PENNSYLVANIA }
} SS
COUNTY OF PHILADELPHIA }

AFFIDAVIT

I, Jonathan Dunn, Esquire, being duly sworn according to law, do depose and state that:

1) I am an attorney at law practicing at Pennsburg, Pennsylvania, and I am admitted to practice before the United States District Court for the Eastern District of Pennsylvania.

2) I am a personal friend of Dr. Donald McCabe and I have represented him on several occasions. Dr. McCabe requested that I represent him in this case as personal counsel. I had entered my appearance in this case.

3) I had personally observed Dr. McCabe and Mrs. Greenberg in their relationship.

4) I was prepared to cross-examine Mrs. Greenberg concerning significant matters, which would have impeached her credibility.

5) I would have, through cross-examination and the calling of witnesses listed below have presented new and significant matters which would have cast the relationship of Dr. McCabe and Gale Greenberg in a different light more favorable to Dr. McCabe.

a) Dr. McCabe on direct examination.
b) Barbara Ackerman, Dr. McCabe's sister.
c) Natalie Haupt, another patient of Dr. McCabe.
d) Eleanor McCabe, Dr. McCabe's daughter.

6) I had discussed the defense of this case with Mr. Joseph since suit started. Prior to trial I disclosed him my intention of calling the witnesses mentioned herein and the outline of my participation in the defense.

7) No witnesses were presented for the petitioner at the trial, Mr. Joseph resting his case at the conclusion of Mrs. Greenberg's case.

Forgoing statements are true to the best of my knowledge, information and belief.

JONATHAN D. DUNN

Sworn to and subscribed
before me this 6th day of
June, 1979

SALLY MORRISON
Notary Public, Phila.,
Phila. Co.
My Commission Expires
April 19, 1982

In The

Supreme Court of the United States

78-1875

October Term, 1979

No. 78-

GALE GREENBERG,

Respondent,

vs.

DONALD LEE McCABE, D.O.,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Supreme Court of the United States

October Term, 1979

No. 78-

GALE GREENBERG,

Respondent,

vs.

DONALD LEE McCABE, D.O.,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the petitioner, defendant in a civil case, who did not request that he be represented by an attorney other than the one chosen by his insurer, did not offer any authority to the trial judge for the proposition that his defense could be conducted by two separate attorneys, never requested such dual representation until the first scheduled day of trial, and made no objection to the trial court's ruling of one questioner per party, was represented by his choice of counsel.

II. Whether the petitioner, defendant in a civil case, is entitled under the Fifth Amendment or Pennsylvania law to be represented by two attorneys at trial.

COUNTERSTATEMENT OF THE CASE

In order to place this civil defendant's claim of a denial of the right to choice of counsel in proper context, a few facts need be mentioned in addition to those stated in the petition for a writ of certiorari.

With one exception, the entire involvement of Jonathan D. Dunn, Esquire, prior to the post-trial proceedings in this case was on the first scheduled day of trial, a day when no testimony was heard, and is contained in the Appendix to the Petition at pp. 7-10. That exception is his entry of appearance on April 11, 1977, over fourteen months after the complaint had been filed and after the case had appeared on the trial list and been continued, as "co-counsel" for defendant (Appendix, *infra*, at 1a).

There is no evidence in the record of Mr. Dunn ever having brought the issues raised in this Court to the attention of the trial judge, Chief Judge Joseph S. Lord, III, prior to September 6, 1977, the day the jury was empanelled. There is no evidence of the reappearance of Mr. Dunn in the courtroom after adjournment at 2:25 p.m. that first day because of a mechanical breakdown in the courthouse (2a). Nor could there have been any evidence of either.

The defendant in this psychiatric malpractice action, Donald Lee McCabe, D.O. was represented before and at trial by Edward B. Joseph, Esquire, a highly competent and experienced member of the Philadelphia trial bar, who has filed a separate petition on behalf of Dr. McCabe. Nowhere do his attorneys allege or even imply that Mr. Joseph's representation was inadequate. Instead, his attorneys for this petition claim a

right to the active participation of two attorneys during the course of trial, an issue which was not pursued until after trial, and then only upon the ground of state law until reaching this Court.

REASONS FOR DENYING THE WRIT

I.

The civil defendant was represented by his choice of counsel.

No purpose would be served by granting certiorari where there is no factual support in the record below for the legal position taken by petitioner in this Court and where there is a failure to raise and preserve the issue.

A review of what is, and is not, in petitioner's Appendix is instructive. His Appendix contains two letters, both addressed to Dr. McCabe from his insurance carrier. The first is dated March 31, 1976, and advised him that he was ". . . at liberty, if [he] so desire[d], to associate [his] own personal counsel, at [his] own expense, in the defense of this suit." (Petitioner's Appendix at 3). The second, dated March 11, 1977, advised him that the carrier would ". . . continue to afford [him] a defense throughout this case . . ." (Petitioner's Appendix at 6). Neither letter was in the lower court record. Surely, if there had been any response from Dr. McCabe that he did not wish to be represented by an attorney engaged by the carrier or that he chose to be represented by any other attorney of his own choosing, that response would have been appended to the petition.

Mr. Dunn's participation in chambers the first day is also illustrative of Dr. McCabe's desires. Mr. Dunn began by stating: "As private counsel here, it is difficult to know when to step in *or to do it at all*." (emphasis added) (Petitioner's Appendix at 7). He followed this with the admission: "[W]here I get into the act

I don't really know here because Mr. Joseph really has carried the ball all the way through . . . ." *Id.* When Judge Lord advised that he would ". . . only permit one attorney to cross-examine for one client," Mr. Dunn did not ask to be that attorney; his response was: "Very well." *Id.* at 7, 8. Mr. Dunn next encouraged the trial judge to make a similar ruling in regard to closing argument:

> "But that leaves us at the point where the address to the jury at the end, I do get a crack at it, or don't I?
>
> THE COURT: Well, I will have to think about that.
>
> MR. DUNN: You would have in effect two attorneys addressing the jury on behalf of one defendant.
>
> THE COURT: My *inclination* is that only one attorney gets a crack at the jury for one defendant." (emphasis added). *Id.* at 8.

At no point did Mr. Dunn request that he act instead of Mr. Joseph, nor did Chief Judge Lord require that Mr. Joseph be the one attorney cross-examining or addressing the jury. Finally, when Mr. Dunn suggested the question of two attorneys posing objections, the judge requested a citation to authority. Again Mr. Dunn acquiesced without objection:

> "THE COURT: Well, you were aware that this problem was going to arise. Do you have any authority on this? Have you looked up any law? Have you attempted to find any law?
>
> MR. DUNN: I have none with me.

> THE COURT: Then I will rule against you until you find something.
>
> MR. DUNN: Then you are ruling that I have no right to participate in effect in this case.
>
> THE COURT: That is right. If you don't think enough of your position to look up some law to give it to me, then I don't think enough of it to sustain your position.
>
> It is a most unusual kind of a situation. I would certainly have thought that you would have given me some law on that, but since you haven't I will simply rule against you *until* you find some law to the contrary.
>
> MR. DUNN: Very well, sir." (emphasis added). *Id.* at 8-9.

Moreover, Mr. Dunn backtracked during the afternoon session from any contention such as the one of conflict of interest which has now been raised:

> "MR. DUNN: O.K. Now, with reference to the conference in the judge's chambers, I held myself as representing the individual defendant; in effect meaning the defendant excess in case — whatever the limits.
>
> Now, I thought perhaps I might have misled the Court. Our position is here that he didn't do anything. Nothing wrong with what he did, but if he did do so it was negligible and not intentional, and that there should be coverage in effect.
>
> THE COURT: That is not before me.

The court did *not* rule that Mr. Dunn had no right to "participate" in the trial, or that he could not sit at defense table and assist Mr. Joseph. Mr. Dunn's decision to abandon the proceedings at that point was entirely his own.

One is left with the inescapable conclusion that Dr. McCabe never selected anyone other than Mr. Joseph to act as his counsel at trial and that Mr. Dunn simply bowed in and out of his own accord. There must be an attempt to raise and preserve a claimed right; else, it is waived. There is also a waiver where an attorney absents himself from the courtroom:

> "It is the right and duty of attorneys to be present in the court room at all times the Court may be in session in his cause. Any attorney who voluntarily absents himself during such times or during the deliberation of the jury, waives his right and that of his clients to be present and consents to such proceedings as may occur in the court room during such absence." Local Rule of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania 32(c).

Finally, it should be noted, as petitioner acknowledged and the trial judge held, that any conflict between the defendant and his insurer is properly the subject of another proceeding, the declaratory judgment action, which was instituted after the verdict (Petition at 4). The conflict of which the defendant now complains was not created by the court or by the plaintiff. Rather, it was created solely by the defendant and/or his representatives. No ruling of the court prevented the defendant from seeking trial representation by an attorney not selected by his insurance carrier; nor did any ruling of the court prevent the defendant's insurance carrier from examining and resolving any apparent conflict of interest created by its insistence that its retained counsel be trial counsel at the same time it was

disclaiming coverage. If the defendant suffered as a result of his insurance carrier's decision, then his relief lies in the declaratory judgment proceeding and should be received from his insurance carrier, not from this Court.

II.

The civil defendant was not denied any right to counsel under the Fifth Amendment or Pennsylvania law.

Petitioner raised three questions for review, only one of which was raised post-trial in the district court or in the court of appeals. He contends: (1) He has a constitutional right to representation by counsel of his choice under the Fifth Amendment which was violated by the trial court's exclusion of Mr. Dunn; (2) He has a constitutional right to representation by counsel of his choice under the Fifth Amendment which was violated by the court's selection of Mr. Joseph; and (3) He has a right to separate and individual representation under Pennsylvania law which was violated by the trial court's exclusion of Mr. Dunn.

That the trial court did *not* exclude Mr. Dunn or choose Mr. Joseph has been treated in the foregoing discussion.

Petitioner's constitutional arguments are made for the first time in this Court. The only section of petitioner's brief in the court of appeals dealing with counsel issues is reproduced in full in the Appendix (3a). It is fundamental that this Court will not review a question not raised in the court of appeals in the absence of exceptional circumstances. *Lawn v. United States*, 355 U.S. 339, 362 n. 16 (1958); *California v. Taylor*, 353 U.S. 553, 556 n. 2. (1957). No such circumstances exist here.

Nevertheless, the petitioner extrapolates a federal right to dual representation by Mr. Joseph and Mr. Dunn from criminal cases such as *United States v. Burton*, 584 F.2d 485 (D.C. Cir.

1978), affording a criminal defendant only the opportunity to secure counsel of his own choosing (an opportunity the insurer afforded the civil defendant here), state court cases such as *Esmond v. Liscio*, 209 Pa. Super. 200, 224 A.2d 793 (1966), defining only the nature of punitive damages, and *DePrampero v. Fidelity and Casualty Co. of N.Y.*, 286 F.2d 367 (3d Cir. 1961), allowing the insurer to prove lack of coverage in post-trial proceedings. Search as he has, petitioner has not found a single case holding that he has a right to have been represented at trial by both Mr. Joseph and Mr. Dunn.

The cases cited by petitioner to support his state law claim are equally inapposite. The issue, for example, in *Seifert v. Dumatic Industries, Inc.*, 413 Pa. 395, 197 A.2d 454 (1964), was who should represent the party, not whether two attorneys should be permitted dual representation. Involved was a petition for removal of counsel prior to trial. Cases such as *Bernat v. Socke*, 180 Pa. Super. 512, 118 A.2d 253 (1955), denying excess liability because the insured retained private counsel, pertain to the declaratory judgment action pending in the lower court, not this case. Similarly, respondent cannot quarrel with cases holding that the insurer should notify the insured of any possible conflict of interest and of his right to have private counsel represent him instead of the insurer's counsel. *E.g., Nichols v. American Casualty Co.*, 423 Pa. 480, 225 A.2d 80 (1966); *Perkoski v. Wilson*, 371 Pa. 553, 92 A.2d 189 (1952).

Once again, petitioner has cited no cases upholding the right he now claims to possess.

No right of the defendant was violated in this case.

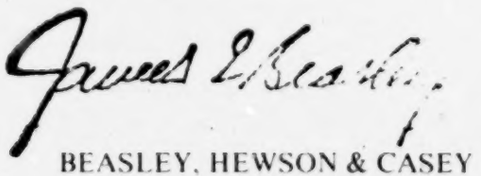
A trial court has great discretion in determining the procedures to be used at trial, and no abuse of that discretion has been alleged. The Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania address that discretion in regard to the number of

attorneys conducting questioning and addressing the jury. Local Rule 32(b) provides: "On the trial of an issue of fact, only one attorney on either side shall examine or cross-examine any witness, unless otherwise permitted by the Court." Likewise, Local Rule 33(a) reads: "Unless the trial judge shall otherwise grant leave, only one attorney may sum up for any party." Had Chief Judge Lord exercised his discretion and allowed two attorneys for Dr. McCabe to pose questions, objections, legal argument and jury argument, an unmanageable trial would have resulted. The jury would have become confused, the examination of witnesses lacking in cohesiveness, the trial unduly prolonged and the court's and jury's attention distracted from the legal and factual issues in the case before them.

CONCLUSION

As there is no factual basis upon which to address the right which petitioner supposes, no raising and preservation of that "right" and no legal support for the position petitioner has taken to invoke this Court's discretion, respondent respectfully prays that this Honorable Court deny the petition for certiorari.

Respectfully submitted,



BEASLEY, HEWSON & CASEY
Attorneys for Respondent

APPENDIX

ENTRY OF APPEARANCE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GALE GREENBERG

vs.

DONALD LEE McCABE, D.O.

CIVIL ACTION

NO. 76-342

TO THE CLERK:

Kindly enter my appearance as co-counsel on behalf of the defendant, Donald Lee McCabe, D.O., in connection with the above-entitled matter.

s/ Jonathan D. Dunn
JONATHAN D. DUNN, ESQUIRE
Co-counsel for Defendant

JONATHAN D. DUNN
Attorney At Law
Box 65
East Greenville, Pa.
679-2968

EXCERPTS OF NOTES OF TESTIMONY

(NT1-24, 1-25)

THE COURT: I only tell you that to illustrate that all of this and the fact that this is in my judgment the finest Courthouse in the United States — and I have seen a lot of them — we still have breakdowns like this where we can't even work.

I am not going to keep you here with a temperature of 87 degree in the courtroom. Some of you might be like me, you might be starting to get sick, because I am from this heat. I don't want that to happen to you.

Secondly, there is no conceivable way that you could pay any intelligent attention to the evidence, if it were to start this afternoon, or the proceedings.

Gentlemen, do you want to finish your voir dire or do you just want to start tomorrow? I don't care.

MR. BEASLEY: I am willing to start tomorrow.

MR. JOSEPH: So am I, sir. I think in fairness to the jury and everyone, it has become distinctly uncomfortable.

THE COURT: I do too. I think it is awful.

* * *

THE DEPUTY CLERK (Mr. Benedetto): All rise. Court is adjourned until tomorrow morning at 10 o'clock.

(Court is adjourned for the day at 2:25 p.m. until Wednesday, September 7, 1977, at 10 o'clock a.m.)

EXCERPT OF PETITIONER'S BRIEF IN THE COURT OF APPEALS

THE TRIAL COURT ERRED IN EXCLUDING DEFENDANT'S PRIVATE COUNSEL FROM PARTICIPATING ACTIVELY AT THE TRIAL

Public policy as defined by Pennsylvania law does not permit a defendant who is found guilty of outrageous conduct to shift the burden of punitive damages to his insurer. *Esmond v. Liscio, supra,* 209 Pa. Super. at 212.

While Mr. Joseph, counsel designated by the carrier was defending the matter fully, nevertheless its direct exposure cannot exceed applicable coverage which does not include punitive damages. A possible conflict could arise thereby allowing defendant to retain an attorney of his choice. *Seifert v. Dumatic Industries, Inc.*, 413 Pa. 395, 398, 197 A.2d 454 (1964). The defendant retained his own private counsel, Mr. Dunn, to represent his interests on the punitive damages issue. Since Mr. Dunn was not permitted to participate actively at trial, the defendant's right to a full defense on the punitive damages issue may have been compromised, therefore, necessitating the reversal of the punitive damages award and granting of a new trial on that issue. Timely objections were made by Mr. Dunn to the trial Court's refusal to allow him to examine the witness and argue to the jury and court (20a-21a).

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1875

GALE GREENBERG, *Respondent*

v.

DONALD LEE MCCABE, D.O., *Petitioner*

Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Additional Statement of the Case

Certain statements in Respondent's Brief in Opposition require reply in order to place the case in its proper perspective and in order to focus on the real issues involved. Without belaboring all of the items involved, some will be commented on. Many of the items do not have legal significance. Others raised have a red-herring value, i.e., they are raised to avoid the legal issues in question. In her counter statement of the case Respondent asserts that Petitioner's counsel do not "allege or even imply that Mr. Joseph's representation was inadequate." (Respondent's Brief in Opposition, P. 2.) That statement is one such red-herring. Adequacy of representation is not the legal issue before this Honorable Court.[1] The question of right to

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1. Petitioner does not concede that he was adequately represented at trial by Mr. Joseph. On the contrary, the affidavit of Jonathan Dunn indicates inadequacy in representation. A-11-A-12. In the case of *Aetna Life & Casualty Co. v. McCabe v. Greenberg* (E.D. Pa.), No. 78-598, Counsel for Petitioner therein, Jonathan Dunn, raises, in his Answer and Counter Claim, many questions concerning the conflict of interest between Dr. McCabe and Aetna. Therein he indicated that Aetna did not pursue avenues of defense such as those raised in his affidavit (A-11-A-12). Other items in the trial record could also be considered on this question:

a). Failure to object to admission of photographs of Mrs. Greenberg's children into evidence, where such pictures would have a severe emotional impact on the jury outweighing any probative value, and where some were not identified as to when taken or by whom, and where one picture was taken in 1964, showing a small child. Dr. McCabe did not meet Mrs. Greenberg until 1968.
(N.T. 3-19, 3-20.)

b). Failure to object to instruction on malpractice that gave the jury carte blanche to decide that anything it wanted was malpractice, that instruction stating:

counsel of one's choice is a clear and simple legal question not involving any detailed factual considerations. It was raised at trial and on appeal.

"There may be other grounds of malpractice, and, as I say, if there are, I hope that you will think of them." (N.T. 7-9.)

c). Failure to object to an instruction that a particular drug used by Dr. McCabe was an "illegal drug", where Dr. McCabe testified that he obtained the drug lawfully before there was any restriction on its use, and that he was lawfully permitted to utilize the amount he had on hand. (N.T. 7-30.)

Adequacy of representation requires a detailed analysis of the record and might require additional testimony. It is a separate and distinct issue from that of right to counsel. Adequacy of representation need not be considered in this case *unless* prejudice is required to be proven on the right to counsel issue. (See Petition for Writ of Certiorari, P.4, F.N. 4.) Even there, divergence in tactics is sufficient prejudice without consideration of adequacy of representation. (A-11-A-12; Petition for Writ of Certiorari, pp. 5-6.)

Reply

I.

Petitioner was denied his right to representation by counsel of his choice.

Counsel for Respondent, in his Brief in Opposition, appears to suggest the following reasons for denial of the Writ of Certiorari:

1) Not a strong enough factual basis in the record to consider the right to counsel issue;

2) Mr. Dunn had not appeared at pre-trial matters, though he had entered his appearance, and had, as his affidavit shows, discussed the case with insurer's counsel;

3) After the trial judge had ruled that Mr. Dunn has "no right to participate in effect in the case" (A-8) Mr. Dunn absented himself for the remainder of the trial, such absence constituting a waiver;

4) 1)-3) above, and failure of Dr. McCabe to voice any personal objection constituted a waiver;

5) The conflict of interest could be resolved in the Declaratory Judgment Action.

First, dealing with 1) above, the record shows: that Mr. Dunn presented the conflict of interest issue to the trial judge; that Mr. Dunn requested to be allowed to actively participate at trial; that he requested a ruling on the question; and that the trial judge ruled in clear, plain English that he could not participate in the case. That is a clear

factual basis. Further, the record shows that there was apparently some off-the-record discussion of this issue. Mr. Joseph refers to "the coverage problem which was raised earlier, sir." (A-8). At the beginning of the first day, Mr. Joseph referred to a letter which the insurer had sent to Dr. McCabe concerning limitation of coverage. He said it was being delivered to him at court but the record does not show that it was. (N.T. 1-1).[2] Whatever the extent of any off-the-record discussion of this matter, or the question of which letter Mr. Joseph was referring to (it could have been A-3 or A-5), it is clear that the issue was raised, presented to the Judge for a ruling, and that an adverse ruling was made. (A-7-A-9.)

The conflict of interest was spelled out for the trial judge unequivocally on the record. (A-7-A-9). Mr. Dunn, in fact only requested the right the Third Circuit recognized in *DiPrampero v. Fidelity & Casualty Co. of N.Y.*, 286 F.2d 367 (3rd Cir. 1961), the right to dual representation where a conflict exists, as here. Indeed, under *DiPrampero*, Mr. Dunn could not have excluded Mr. Joseph from full and independent representation, each attorney representing a distinct interest.

In his final statements in chambers Mr. Dunn reiterated his role as defending the uninsured interest of Dr. McCabe. His duty, in addition to defending against any liability, was to establish

2. This was not made a part of the Appendix. The discussion about the letter was sandwiched between other irrelevant matters, and was not a part of the trial judge's ruling. It is raised here only to show that there had already been discussion on the conflict of interest question both off-the-record and tangentially on-the-record before the final discussion and ruling at A-7-A-10.

that if there were liability such liability would be covered by the insurance policy. See *DiPrampero v. Fidelity & Casualty Co. of N. Y., supra.*

With respect to 2) above, Mr. Dunn was not required to have appeared at any pretrial matters. Nothing in the law prevented him from being active counsel only at trial.

With respect to 3) above, the failure to return on subsequent days of the trial, it should be noted that once the trial judge ruled he could not participate Local Rule 32(c), applying to voluntary absence of counsel *representing* a client, had no application. Indeed, if he had sat at counsel table that could have been construed as a waiver. Compare *LaRocca v. State Farm Mutual Automobile Insurance Co.* 329 F. Supp. 163 (W.D. Pa. 1971), aff'd, 474 F.2d 1338 (3rd Cir. 1973). (Individual counsel was present at trial, but did nothing on the record, which was an acquiescence to the conduct of the case by counsel for insurer).

With respect to 4) it should seem obvious that it would be inappropriate for Dr. McCabe to voice his personal objection when the ruling had already been made, and where he was not asked by the trial judge to state his desires. Clearly, a waiver here, where Petitioner had his personal counsel at trial, cannot be inferred from a silent record. In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) this Honorable Court stated the rule that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," and that for waiver to apply there must be shown "an intentional relinquishment or abandonment of a known right or privilege." Such a waiver of the right to counsel must appear on the record. *Johnson v. Zerbst, supra.* In analogous cases in the criminal area an

accused cannot waive his right to counsel at any stage of the proceedings, pre-trial, as well as at trial, without a specific colloquy on the record between the accused and the judge, magistrate, or arresting officer or interrogator, wherein the accused says he does not want counsel. *Miranda v. Arizona*, 384 U.S. 436 (1965); *United States v. Wade*, 388 U.S. 219 (1967). An accused cannot waive a jury trial without a written waiver signed by him or a colloquy on the record wherein the trial judge asks him if he makes such a waiver, during which time the judge advises him of his right. *Patton v. United States*, 281 U.S. 276 (1930); *United States v. Hooper*, 576 F.2d 1382 (9th Cir. 1978). Such a waiver of a constitutional right must be strictly construed even in a civil case. *Burnham v. North Chicago Street Ry. Co.*, 88 F. 627 (7th Cir. 1898); *F.M. Davis & Co. v. Porter*, 248 F. 397 (8th Cir. 1918); *United States v. Lee*, 539 F.2d 606, 609 (6th Cir. 1976).

With respect to 5), the question of conflict of interest cannot be resolved in the Declaratory Judgment Action. The insurer had the right to have its counsel present to actively represent the Petitioner to the extent of its insured interest. *DiPrampero v. Fidelity & Casualty Co. of N. Y., supra.* The insured, Petitioner, had the right to have his own independent counsel present to represent his uninsured interest. *DiPrampero v. Fidelity & Casualty Co. of N.Y., supra.* The insurer was also prejudiced by the ruling. The insurer's counsel, Mr. Joseph, did not desire the ruling. Hence, on this issue, there is no redress absent review in *this* case.

II.

The Petitioner was denied his right to representation of counsel of his choice under the Fifth Amendment and Pennsylvania law.

Here, counsel for respondent makes the following arguments:

1) The Fifth Amendment ground of the denial of counsel question was not expressly argued in the Court of Appeals;

2) the denial of the right under Pennsylvania law is not established in an all-fours case where the issues is raised in the original tort case, as is done herein;

3) the local rules give the trial judge discretion to limit cross-examination and summation to one attorney.

With respect to 1) above, there are three answers:

a) The right to representation by counsel of one's choice is a right of inherently constitutional dimensions, and is implicit in the issue, whether or not articulated as such;

b) In *Giordenello v. United States*, 357 U.S. 480, 484 (1958), this Honorable Court considered an issue based on two constitutional grounds, where only one of the grounds was urged below. See also *Sabbath v. United States*, 391 U.S. 585, 588, N.1 (1968); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214 (1951);

c) Finally, where the issue is a significant, constitutional question this Honorable Court may consider it, whether or not raised below. *Brotherhood of Carpenters v. United*

States, 330 U.S. 395, 412 (1947); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941);

In the cases cited by respondent, *California v. Taylor*, 353 U.S. 553, 556, N.2 (1957), and *Lawn v. United States*, 355 U.S. 339, 362 N.16 (1958), the parties sought to raise issues not raised in the petition for writ of certiorari, and the issues sought to be raised were not related to the granted issues, rendering them inapplicable to the instant case.

With respect to 2) above, it should be noted that in *Nichols v. American Casualty Co.*, 423 Pa. 480, 225 A.2d 80 (1966) the Pennsylvania Supreme Court clearly stated the rule urged by Petitioner, that he had a right to independent counsel:

> " . . . Defendant subsequently advised plaintiffs to retain counsel of their choice to represent their interests in the event that there should be a judgment in excess of the insurance coverage. *Plaintiffs did retain private counsel, who together with the attorney supplied by defendant, represented them at trial and on appeal before this Court* . . .
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> * * * * *
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> A case much on point is *DiPrampero v. Fidelity and Casualty Co. of New York*, 286 F.2d 367 (3d Cir. 1961). . . . The insurer had advised the insured that it was questionable whether or not the accident was within coverage of the policy and that it would, nevertheless, undertake to defend him, but only to the extent of the insured interest. *The insured elected to retain for the defense of his uninsured interest the lawyer employed by the insurance company to represent him on the insured interest*. . . . [T]he insurer denied coverage under the policy. Affirming a judgment for the insurance carrier, the Third Circuit held that the insured did not suffer injury at the hands of the insurance company or its attorney, who in no way sacrificed the uninsured interest. Since there was no prejudice to the insured in *DiPrampero, where one counsel represented the insured in two capacities*, there can be no prejudice in the instant case where the plaintiffs obtained private counsel. Despite our recognition in *Gedeon v. State Farm Mutual Automobile Insurance Company*, 410 Pa. 55, 188 A.2d 320 (1963), that the obligation to indemnify is separate from the obligation to defend, the more cautious practice is that even where there is absent the possibility of a verdict in excess of the policy limits, if an insurance carrier is contemplating refusing to indemnify it should advise the insured to secure competent counsel of his choice. In the instant case, the carrier, by following this practice, avoided the risk that the insured might suffer injury by reason of being denied insurance coverage after trial or settlement, *at which he was not represented by his own counsel*. . . ."
> (Emphasis added).

It would be difficult to have a more clear exposition of the right to independent counsel by an insured.

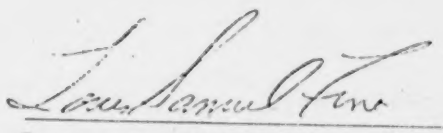
This pronouncement by the Pennsylvania Supreme Court, whether considered dicta or a clear holding, must be considered as the definitive determination of Pennsylvania law. *Doucet v. Middleton*, 328 F.2d 97 (5th Cir. 1964); *Curtis Publishing Co. v. Cassel*, 302 F.2d 132 (10th Cir. 1962); *Hartford Acc. & Indemnity Co. v. First Nat. Bank & Trust Co. of Tulsa*, 287 F.2d 69 (10th Cir. 1961); *United States Fidelity & Guaranty Co. v. Anderson Constr. Co.*, 260 F.2d 172 (9th Cir. 1958); *Hardy Salt Co. v. Southern Pac. Transp. Co.*, 501 F.2d 1156 (10th Cir. 1974);

Boynton v. Ryan, 157 F. Supp. 324 (E.D. Pa. 1958), aff'd, 257 F.2d 70 (3rd Cir. 1958). A clear statement of the law must be accepted. *Boynton v. Ryan*, supra. See *Brink's Inc. v. Hoyt*, 179 F.2d 355 (8th Cir. 1950) (When State Court has not passed on the exact question the considered dictum of the State's highest court should not be ignored). The *right* to individual representation is no right at all if the trial court may blithely ignore it when it is raised by individual counsel.

With respect to 3) above, concerning Local Rule 33(a), that rule of discretion does not apply where its application would violate the constitutional right to counsel of one's choice or a right guaranteed by state law required to be honored under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Conclusion

WHEREFORE, Petitioner prays that this Honorable Court grant the Petition for Writ of Certiorari.



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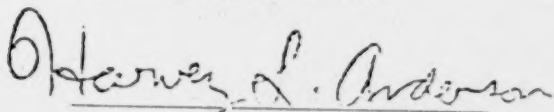

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